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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LAWRENCE JOSEPH LUCICH,

Defendant and Appellant.

H025058

(Santa Clara County  
Super. Ct. No. 197510)

Defendant Lawrence Joseph Lucich, on three years' probation for felony perjury and worker's compensation insurance fraud, paid only \$830 of the \$53,029.53 in restitution by the day probation was set to expire. On the day after defendant's first probation violation hearing, with sentence for the violation pending, he paid the balance. Nevertheless, new charges that he violated probation by failing to timely pay restitution were filed thereafter. The trial court found him in violation of probation and ordered him to serve an additional 180 days in custody. On appeal, defendant claims this was an abuse of discretion and that the additional time caused his sentence to exceed the maximum allowed by law.

FACTS

In November 1991, then 53-year-old defendant was convicted of driving under the influence in Santa Clara County and was ordered to serve eight months in custody and participate in the county department of corrections Public Service Program. He started at

the Goodwill Store on December 7, 1991, and that same day defendant claimed that a large cardboard barrel of clothing fell on him while he was working at the rear of the store. Defendant reported that his back and left knee were injured and he filed a Worker's Compensation claim with the county. He received benefits, investigative and legal fees, and medical expenses for a total of \$53,029.53. Later, defendant was videotaped climbing ladders, painting homes, and gardening while he continued to maintain he could not work, walk normally, or bend, and that he was in significant pain. A jury subsequently found him guilty of Worker's Compensation fraud and perjury.

Defendant made regular monthly payments of \$20 to \$40 on the amount due for restitution. However, on November 27, 2001, two days before defendant was to appear in court on the probation officer's petition to modify probation by extending it for two years and setting the mandatory payments at \$500 per month, defendant called the probation department claiming he could not pay restitution and that he was innocent of the underlying charges. A month later, he went to the probation department to be interviewed and claimed that he was innocent of the underlying charges because he was really injured and entitled to the money he received. He claimed he had not been able to work since 1994 because of the injuries and that he was suffering from a degenerative bone disease. He used a cane at the probation office. The probation officer asked defendant to provide documentation of his medical condition, but defendant provided none. The probation officer and defendant reviewed defendant's assets and obligations. Defendant said he had cars worth a total of \$1,000, life insurance worth \$1,000, furniture worth \$500 and jewelry worth \$100. Defendant claimed he did not own any real estate. Defendant signed a financial statement which he re-signed on January 16, 2002.

At the probation revocation hearing on May 28 and 29, 2002, it was revealed that defendant owned two pieces of real estate in San Jose. Defendant received those properties from his elderly mother who retained a life estate in them. From March 1992 until March 2002, defendant also jointly owned real estate with his mother and two

brothers. Two months after signing his second financial statement and two months before the probation revocation hearing, defendant sold his interest in the jointly held property to a brother for valuable consideration.

In addition, at a slightly earlier April 29, 2002, hearing on defendant's case, Catherine Fazo, a probation officer, was in the courtroom. She observed defendant use a cane to leave the courtroom and get to his car. She followed him to a residence. Defendant did not have the cane when he got out of the car. Fazo watched defendant walk up the driveway and into the residence with a "very capable, very easy gait." Defendant was not using anything to aid his walking. There was no limp or other evidence of impairment. Later that afternoon, Fazo watched defendant as he walked around and in and out of the residence. There was no cane and no limp.

On May 7, 2002, district attorney investigator Roland Bye observed defendant walking, bending for paper, and getting in and out of his truck without a cane or limp. Two days later, Bye observed defendant sweeping for 20 minutes and carrying garden trash without a cane or limp.

Defendant testified that he obtained the real estate from his mother and did not think he could encumber it in any manner until after her death. He claimed he could walk short distances but suffers much pain after walking more than 300 feet.

The trial court found there was no credible evidence that defendant had a medical disability or handicap restricting his ability to maintain gainful employment. Defendant simply chose not to work. In addition, at least since June 2001, defendant had the ability to pay restitution because of the real estate he owned. Nevertheless, defendant willfully failed to pay restitution. Defendant was remanded into custody and the matter was continued for sentencing with strong suggestion that defendant pay restitution before sentencing to avoid state prison.

The next day, defendant's brother paid the restitution by cashier's check. At sentencing, the trial court ordered defendant to serve 180 days in the county jail with probation terminating upon his release. This appeal ensued.

### ISSUE ON APPEAL

Defendant asserts the trial court abused its discretion in imposing a jail sentence because at the time of the modification of probation, restitution had been paid in full and there was insufficient evidence that he willfully failed to pay restitution. Also, the 180-day sentence exceeded by two months the 12 month maximum he could have been given and therefore constituted an unauthorized sentence.

### DISCUSSION

According to defendant, evidence that he willfully failed to pay restitution was insufficient because there was no set payment schedule for the restitution, and there was no evidence that he was ever told that he should borrow funds to pay it. Defendant contends that when he was told he had to borrow money, "he complied and paid the restitution in full." Defendant also states that the court also disregarded substantial evidence that he was disabled, namely, his testimony about significant pain in his legs, the medical evidence which indicated the atrophy of his leg, or the fact that the Social Security Administration had found him unable to work and was giving him monthly assistance.

“ ‘ “In placing a criminal on probation, an act of clemency and grace [citation], the state takes a risk that the probationer may commit additional antisocial acts. Where probation fails as a rehabilitative device, as evidenced by the probationer's failure to abide by the probation conditions, the state has a great interest in being able to imprison the probationer without the burden of a new adversary criminal trial. [Citation.]” [Citation.] The role of the trial court at a probation revocation hearing is not to determine whether the probationer is guilty or innocent of a crime but whether he can be safely allowed to remain in society. [Citation.] [¶] . . . [Penal Code] section 1203.2 provides

the court may revoke probation if it has reason to believe that the person has violated any of the probation conditions. More lenient rules of evidence apply than at criminal trials [citation], and the facts supporting revocation need only be proved by a preponderance of the evidence [citation].’ ” (*People v. McGavock* (1999) 69 Cal.App.4th 332, 337.) On review, a trial court’s decision to revoke probation will not be disturbed unless the court abused its discretion. (*People v. Angus* (1980) 114 Cal.App.3d 973, 987-988.)

The trial court had received evidence that defendant actively misled the probation department about his financial condition. He had substantial real estate interests, both individually and jointly with his family. He did not disclose these interests to the probation department and signed two financial declarations denying that he had any real property. In addition, defendant was informed of his obligation to pay restitution at the original sentencing hearing when probation was granted. He was informed that he was in violation of probation in early November 2001 and he was informed of the outstanding balance of restitution. When he was interviewed by the probation officer, he again denied that he had real estate or the means to pay. Only after the court revoked his probation in May and warned him that he would probably go to state prison if he did not pay, was the money produced on defendant’s behalf.

As for defendant’s physical condition, the trial court had evidence of observations of defendant’s daily activities and letters from defendant’s doctors and his Social Security certification. The trial court observed defendant in the court room and noted that defendant was reaching his hands above his head and his elbows above his shoulders while he was testifying. The court asked defendant if he did that without difficulty (defendant said he had had pain medication at 8:00 o’clock that morning) and the court stated that defendant’s “joints appear to be flexible enough to freely move your hands up over your head.”

In contradiction of the evidence of defendant’s ability to move relatively freely, defendant testified that his joints were deteriorating, that he took pain medication twice a

day, that he received physical therapy and steroid shots for his back and hip, which were injured when the barrel fell on his back, but the hip was getting better, and that he had other diseases for which he was taking medication such as hypertension and diabetes.

We are ever cognizant that “ ‘it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.’ ” (*People v. Thornton* (1974) 11 Cal.3d 738, 754, disapproved on other grounds, *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) In this case, the trier of fact determined that issue adversely to defendant. There is substantial evidence in the record to support the court’s finding that there was no credible evidence in this record that defendant had a medical disability or handicap restricting his ability to maintain gainful employment. Defendant’s claims of pain and disability were contradicted by the testimony of observations of defendant’s activities, by the court’s observation of defendant’s activities in court, and by defendant’s admission that some of his injuries were getting better. There was no error.

#### UNAUTHORIZED SENTENCE

Next, defendant claims that the six months defendant was ordered to serve in the county jail, when added to the eight months defendant had already served, exceeded 12 months, the maximum term allowed by law (Pen. Code, § 19.2) and was, therefore, an unauthorized sentence.

The People respond that the issue is moot. Defendant was sentenced on July 23, 2002, so even if he served the entire sentence, by the time of the consideration of this appeal, he was released and probation was terminated. We agree with the People that there are no prejudicial collateral consequences that a successful appeal on this issue could ameliorate. Consequently, this claim on appeal will be dismissed by this court. (*People v. Lindsey* (1971) 20 Cal.App.3d 742, 744.)

DISPOSITION

The judgment is affirmed.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.